

1992

State of Utah v. Robert Alan Phillips : Brief of Appellee

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Paul Gotay; Attorney for Appellant.

R. Paul Van Dam; Attorney General; J. Frederic Voros, Jr.; Assistant Attorney General; Attorneys for Appellee.

Recommended Citation

Brief of Appellee, *Utah v. Phillips*, No. 920693 (Utah Court of Appeals, 1992).
https://digitalcommons.law.byu.edu/byu_ca1/3669

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

BRIEF

AM
CUMENT
U

0
CKET NO. 920693
IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff-Appellee,	:	Case No. 920693 CA
v.	:	
ROBERT ALAN PHILLIPS	:	Priority No. 2
Defendant-Appellant.	:	

BRIEF OF APPELLEE

- - - - -

APPEAL FROM A DENIAL OF A MOTION TO WITHDRAW
GUILTY PLEA TO FIRST DEGREE MURDER IN THE
THIRD JUDICIAL DISTRICT COURT, SALT LAKE
COUNTY, THE HONORABLE MICHAEL R. MURPHY
PRESIDING.

R. PAUL VAN DAM (3312)
Attorney General
J. FREDERIC VOROS, JR. (3340)
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114
Telephone: (801) 538-1022

Attorneys for Appellee

PAUL GOTAY
Attorney at Law
5085 South State Street
Murray, Utah 84107

Attorney for Appellant

FILED

NOV 25 1992

John T. Homan
Clerk of the Court
Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff-Appellee,	:	Case No. 920693 CA
v.	:	
ROBERT ALAN PHILLIPS	:	Priority No. 2
Defendant-Appellant.	:	

BRIEF OF APPELLEE

- - - - -

APPEAL FROM A DENIAL OF A MOTION TO WITHDRAW
GUILTY PLEA TO FIRST DEGREE MURDER IN THE
THIRD JUDICIAL DISTRICT COURT, SALT LAKE
COUNTY, THE HONORABLE MICHAEL R. MURPHY
PRESIDING.

R. PAUL VAN DAM (3312)
Attorney General
J. FREDERIC VOROS, JR. (3340)
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114
Telephone: (801) 538-1022

Attorneys for Appellee

PAUL GOTAY
Attorney at Law
5085 South State Street
Murray, Utah 84107

Attorney for Appellant

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.	ii
JURISDICTION.	1
NATURE OF THE PROCEEDINGS	1
ISSUE PRESENTED ON APPEAL AND STANDARD OF REVIEW.	1
CONSTITUTIONAL PROVISIONS, STATUTES AND RULES	2
STATEMENT OF THE CASE	3
STATEMENT OF FACTS.	3
SUMMARY OF ARGUMENT	16
ARGUMENT BECAUSE IN 1980 DEFENDANT PLED GUILTY VOLUNTARILY AND WITH A CLEAR UNDERSTANDING OF THE CHARGE, THE TRIAL COURT IN 1992 PROPERLY DENIED HIS MOTION TO WITHDRAW THE GUILTY PLEA	18
A. Defendant Waived Any Issue Involving Potential Defenses.	19
B. The State Proffered Overwhelming Evidence of Defendant's Guilt, But Defendant Fails to Marshal It.	19
C. Defendant's Guilty Plea Was Proper Under <u>North Carolina v. Alford</u>	21
D. <u>State v. Breckenridge</u> Does Not Assist Defendant	23
CONCLUSION.	25
ADDENDUM	
A. Judgment and Commitment (1980)	
B. Memorandum Decision and Order Denying Motion to Withdraw Plea (1992)	
C. Plea Colloquy (1980)	
D. Plea Affidavit (1980)	

TABLE OF AUTHORITIES

CASES CITED

	Page
<u>Halliday v. United States</u> , 394 U.S. 831, 89 S. Ct. 1498 (1969)	18
<u>Hurst v. Cook</u> , 777 P.2d 1029 (Utah 1989)	22
<u>Jolivet v. Cook</u> , 784 P.2d 1148 (Utah 1989), <u>cert. denied</u> , 493 U.S. 1033, 110 S. Ct. 751 (1990)	16
<u>North Carolina v. Alford</u> , 400 U.S. 25, 91 S. Ct. 160 (1970)	17, 21, 22, 24
<u>State v. Amicone</u> , 689 P.2d 1341 (Utah 1984)	19
<u>State v. Anderson</u> , 789 P.2d 27 (Utah 1990)	23
<u>State v. Breckenridge</u> , 688 P.2d 440 (1983)	17, 23
<u>State v. Chavez</u> , No. 910723-CA (Utah App. Oct. 22, 1992)	20, 21
<u>State v. Gallegos</u> , 738 P.2d 1040 (Utah 1987)	18
<u>State v. Mildenhall</u> , 747 P.2d 422 (Utah 1987)	2, 25
<u>State v. Moosman</u> , 794 P.2d 474 (Utah 1990)	20
<u>State v. Reiners</u> , 803 P.2d 1300 (Utah App. 1990).	19
<u>State v. Thorup</u> , No. 920404-CA (Utah App. Nov. 13, 1992)	18
<u>State v. Trujillo-Martinez</u> , 814 P.2d 596 (Utah App. 1991)	2, 25
<u>State v. Wareham</u> , 772 P.2d 960 (Utah 1989)	19
<u>Strong v. Turner</u> , 22 Utah 2d 294, 452 P.2d 323 (Utah 1969)	19
<u>Willett v. Barnes</u> , No. 900344 (Utah Oct. 28, 1992)	16

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Utah Code Ann. § 76-5-202 (1978)	1, 2
Utah Code Ann. § 76-6-302 (1978)	1, 2
Utah Code Ann. § 77-13-6 (1990).	18
Utah Code Ann. § 78-2a-3 (1992).	1

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff-Appellee,	:	Case No. 920693 CA
v.	:	
ROBERT ALAN PHILLIPS	:	Priority No. 2
Defendant-Appellant.	:	

BRIEF OF APPELLEE

- - - - -

JURISDICTION

This Court has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(k) (1992).

NATURE OF THE PROCEEDINGS

Defendant Robert Alan Phillips pled guilty on June 16, 1980 to first degree murder, a capital felony, in violation of Utah Code Ann. § 76-5-202 (1978) and aggravated robbery, a first degree felony, in violation of Utah Code Ann. § 76-6-302 (1978). He now appeals from a denial of his motion to withdraw the guilty plea in the Third Judicial District Court, Salt Lake County, the Honorable Michael R. Murphy presiding.

ISSUE PRESENTED ON APPEAL AND STANDARD OF REVIEW

Did the trial court properly determine that defendant pled guilty to first degree murder voluntarily and with a clear understanding of the charge, including the element that the

killing was intentional? An appellate court "will not disturb a trial court's determination that a defendant has failed to show good cause for withdrawal of a guilty plea unless it clearly appears that the trial judge abused his discretion." State v. Trujillo-Martinez, 814 P.2d 596, 599 (Utah App. 1991); accord State v. Mildenhall, 747 P.2d 422, 424 (Utah 1987).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

All provisions upon which the State relies are set out in the body of the brief.

STATEMENT OF THE CASE

In 1980, Defendant was charged with first degree murder, a capital offense, in violation of Utah Code Ann. § 76-5-202 (1978) and aggravated robbery, a first degree felony, in violation of Utah Code Ann. § 76-6-302 (1978) (R. 15, 23-24).

Defendant was bound over after a preliminary hearing where seven witnesses testified (R. 20-21; State's Exhibit 14-S, Transcript of Preliminary Hearing [hereinafter "Prelim."] 1-ii).

Defendant pled guilty to murder in the first degree and aggravated robbery (Defendant's Exhibit 1-D, Transcript of Plea Hearing and Penalty Phase [hereinafter "Plea Tr."] 1-24). He was sentenced to an indeterminate term of life imprisonment on the murder conviction and a term of not less than five years for the aggravated robbery conviction (R. 222) (Addendum A). No appeal was taken.

In 1992, defendant filed a motion to withdraw his guilty plea (R. 227-34).¹ The trial court filed a Memorandum Decision and Order denying the motion on May 12, 1992 (R. 252-56) (Addendum B). Defendant's Notice of Appeal was timely filed on June 5, 1992 (R. 257-58).

STATEMENT OF FACTS

At about 10:30 p.m. on New Year's Day, 1980, defendant sat in a friend's apartment and filed a notch in the handle of his .357 revolver (Prelim. 61, 123, 148). He had killed Everett Hamby, Jr. about an hour and a half earlier (Prelim. 146, 148). The facts surrounding the killing were fleshed out at the preliminary hearing, the plea hearing, and the sentencing hearing.

PRELIMINARY HEARING

Defendant's friend, Kendall Northern, gave the following account of the killing at the preliminary hearing:

On January 1, 1980, defendant and Northern hailed a cab in Salt Lake City (Prelim. 116, 123). They drove around for about an hour and a half, discussing among other things the personal and family life of the Mr. Hamby, the cab driver (Prelim. 137).

At one point defendant experienced or feigned sickness (Prelim. 135). After the cab stopped, defendant got out, pulled the cab driver's door open, pointed a revolver at him, and told

¹ So far as the State can determine from the record, this motion related only to the charge of first degree murder, not aggravated robbery.

him to get out and lie down behind the cab, which he did (Prelim. 138). Defendant removed some money from the cab driver's pockets. The driver offered no resistance (Prelim. 139-40). Defendant then walked approximately five feet away, raised and braced his revolver, and shot the driver (Prelim. 142). About 30 seconds later, defendant shot the driver two more times (Prelim. 143).

With the gun in one hand and the money in the other, defendant got in the passenger side of the cab and counted the money (Prelim. 143-44). There was \$26 (Prelim. 144).

Northern testified that defendant said that if Northern said anything about the crime defendant would kill him, and if defendant was "busted," i.e., jailed, "he had people that could kill me" (Prelim. 144).

The two dropped the car off near Trolley Square and wiped off the prints (Prelim. 145). Back at Northern's apartment, defendant notched his gun handle. It was the second notch (Prelim. 148).

The day after the shooting, defendant read a newspaper account of the shooting. In fact, "he cut it out and said he ought to call the paper because it wasn't accurate" (Prelim. 166). Defendant "bragged about how he shot him once behind the ear and he said the paper said he shot him in the back and he said he ought to call the paper because he didn't shoot him in the back, he shot him in the side" (Prelim. 166-67).

In addition to Norther's testimony, Dr. Monique Ryser, assistant Utah State medical examiner, testified that any of the three shots, "by themselves, taken alone, could have been fatal" (Prelim. 102, 112).

PLEA HEARING

The plea hearing was held on June 16, 1980 before the Honorable Christine M. Durham. Defendant was present and represented by two defense counsel, Glenn Iwasaki and Fred Metos (Plea Tr. 1). The prosecutor read into the record a document setting forth the terms of the plea bargain (Plea Tr. 2-3). This document, entitled Stipulation as to Understanding with Respect to Plea, was later signed by both defense counsel, the trial prosecutor, and the Salt Lake County Attorney (R. 214-15). The stipulation provided that defendant would plead guilty as charged in the information and that the prosecution would advise the court that the case was one for which capital punishment might be legally justified, but would not make "an impassioned plea for the imposition of the death penalty" (Plea Tr. 3; R. 216).

At the plea hearing Mr. Iwasaki stated, "Mr. Metos and I have spent considerable time with Mr. Phillips regarding the ramifications of his entry of the plea and also the ramifications of the possible penalty he is facing" (Plea Tr. 4). He indicated that a plea affidavit had been prepared and discussed with defendant "in detail" (Plea Tr. 4-5).

The court questioned defendant at length.² The following is excerpted from the plea colloquy:

THE COURT: All right. Can you explain to the court in your own words why you have decided to plead guilty to these charges?

THE DEFENDANT: Well, I feel that it is being the best of justice [sic], actually.

THE COURT: How is it in the best interest of you is what I am concerned about.

THE DEFENDANT: I am going to get some assistance in furthering my education or helping myself, to better myself, whereas I can help others.

MR. IWASAKI: That is not the question, Mr. Phillips. The question was in light of everything that we have all discussed, and in light of your involvement in this matter, why are you changing your plea to guilty rather than retaining a not guilty posture? Why are you pleading guilty today?

THE DEFENDANT: I am not sure.

MR. IWASAKI: Did we not discuss what the State was going to do at the penalty phase is to not ask for the death penalty, per se, by at least putting in facts before the court as to what they believed the facts to be?

THE DEFENDANT: Yes.

MR. IWASAKI: Did we not discuss that?

THE DEFENDANT: Yes, we did.

MR. IWASAKI: And is the Information that -- Is that one of the reasons why you are changing the plea, because the county attorney's office has stated that they would not demand that you be executed?

² Pages 1-15 of the plea transcript contain the entire plea colloquy. They are annexed hereto as Addendum "C."

THE DEFENDANT: Yes.

MR. IWASAKI: But rather, submit it to the court?

THE DEFENDANT: Yes. That is true.

THE COURT: All right.

Mr. Phillips, did you --

MR. METOS: May I also add, Your Honor,--

You are also aware, Robert, of the state of the evidence and we have discussed the chances of your being found guilty of a lesser offense and being found guilty of the offense that is charged?

THE DEFENDANT: Yah. We have gone through that.

THE COURT: All right. After having gone through that with your counsel, Mr. Phillips, do you have an opinion about the evidence against you? Do you think that you are likely to be convicted of the greater offense?

THE DEFENDANT: Yes, ma'am. Yes, ma'am, I do.

THE COURT: All right. And we will be spending considerable time, I think, reviewing that evidence, although, as I understand it, the defendant's plea is entered.

And Mr. Phillips, I need you to indicate to me if you are entering your plea of guilty because you are in fact guilty of the offenses that are charged in the Information.

THE DEFENDANT: Yes, ma'am, I am.

THE COURT: All right. Specifically, the Information alleges that on or about January 1st, 1980, here in Salt Lake County, you caused the death of Everett Hamby, Jr. while you were engaged in the commission of an aggravated robbery?

THE DEFENDANT: Yes, ma'am.

THE COURT: Are those facts true and correct?

THE DEFENDANT: Yes, ma'am.

THE COURT: All right. And did you cause his death knowingly and intentionally at that time?

THE DEFENDANT: Not intentionally. It was accidental. But I was still at fault.

THE COURT: All right.

With respect to the intentional part, I will need a proffer from counsel respecting the facts that exist to establish intent.

THE IWASAKI: Your Honor, the facts would indicate that Mr. Hamby was shot once in the back of the head, a bullet going from right to left in an area about a centimeter above the top of his ear, exiting approximately -- atop of his right ear, exiting approximately the middle of the temporal bone on his left ear.

Further, the evidence will show, and Mr. Phillips has subsequently confessed to the -- that a second and third shot were placed into the body by Mr. Phillips.

Based upon Mr. Phillips' inability to explain the reasons why the second and third shot were fired, it is our opinion, Mr. Metos and myself, that, with a hurdle to pass, the facts would indicate an intentional nature, although in Mr. Phillips' own mind there is some question as to whether or not the first shot was intentional. However, the other two shots, the unexplainability of those other two shots, would indicate from circumstantial evidence his [sic] intentional nature of them.

THE COURT: All right.

Mr. Phillips, do you disagree in any way with what Mr. Iwasaki has said about what the evidence would show?

THE DEFENDANT: No. No, ma'am.

THE COURT: All right.

In Count II of the Information you are charged on the same day with having unlawfully and intentionally taken personal property from the possession or the control of Everett Hamby, Jr. against his will by the use of force or fear. Do you admit to those facts as well?

THE DEFENDANT: Yes, ma'am, I do.

THE COURT: All right. And do you admit to the intent with respect to those facts? Do you acknowledge that you intended to take the property from his possession with the use of force or fear or a firearm?

THE DEFENDANT: Yes, ma'am.

. . .

THE COURT: All right. I would like you now to sign that affidavit that is before you on the podium that Mr. Iwasaki has prepared and that we have discussed here, and I want you to sign it as an indication, number one, that you have read it; number two, that you understand its contents; number three, that everything that is in its contents is true and accurate and correct as far as you know; and number four, and most important, that your decision to enter this plea of guilty is freely and voluntarily made, that nobody's threatened you or promised you anything except what we have talked about, the State not arguing strenuously, and that you desire to plead guilty yourself.

THE DEFENDANT: Yes, ma'am.

THE COURT: Are all of those things true?

THE DEFENDANT: Yes, ma'am, they are.

THE COURT: All right. Would you sign the affidavit now in open court, please.

MR. IWASAKI: Sign your full name.

(Defendant complies.)

MR. IWASAKI: As previously stated, Your Honor, Mr. Metos and myself and [the prosecutor] have signed this already.

THE COURT: All right. May I see it?

(Affidavit submitted to the court.)

THE COURT: Although I don't ordinarily require the formality of having the witness sworn in connection with the affidavit, I think in this case I would prefer to do that.

MR. IWASAKI: I would agree, Your Honor.

THE COURT: Would you raise your right hand, please, Mr. Phillips. And what I want you to do i[s] take an oath on the record with respect to the truthfulness of your statements as contained in this affidavit.

THE CLERK: Do you solemnly swear the testimony you are about to give in the matter now before the court will be the truth, the whole truth, and nothing but the truth, so help you, God?

THE DEFENDANT: I do.

THE COURT: All right. Thank you.

Mr. Phillips, you are now formally and officially under oath, and I would like you to reaffirm your answer to the questions which I have just asked you; namely, does your signature on this affidavit represent the fact that, number one, you have read it?

THE DEFENDANT: Yes, ma'am.

THE COURT: Number two, that you understand it?

THE DEFENDANT: Yes, ma'am.

THE COURT: Number three, that its contents are true and correct?

THE DEFENDANT: Yes, ma'am.

THE COURT: And number four, that your decision to plead guilty is made of your own free will and choice?

THE DEFENDANT: Yes, ma'am.

THE COURT: All right. Thank you very much.

Having heard the defendant's affirmation of his now sworn statements in the affidavit, and having reviewed the affidavit, based upon its contents and his re[s]ponses to my questions here in open court, I find that his plea of guilty to two charges, one of criminal homicide, murder in the first degree, and one of aggravated robbery, a first degree felony, is freely and voluntarily made. I will order that it be accepted and entered in the record of the court.

(Plea Tr. 5-10, 13-15).

The affidavit signed and ratified under oath by defendant (Addendum "D") states in paragraph 12:

I have read this affidavit, or I have had it read to me by my attorneys, and I know and understand its contents. I am 26 years of age, have attended school through the 12th grade and I can read and understand the [E]nglish language. I have discussed its contents with my attorneys and ask the court to accept my plea of guilty to the charges set forth above in this affidavit because I did, in fact, on the 1st day of January, 1980, in Salt Lake County, State of Utah, intentionally or knowingly cause the death of Everett Hamby, Jr. while I was engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit Aggravated Robbery; and that on or about the 1st day of January, 1980, in Salt Lake County, State of Utah, unlawfully and

intentionally take personal property in the possession of Everett Hamby, Jr. at or near 2700 West 900 South, from the person or immediate presence of Everett Hamby, Jr., against his will, by the use of force of [sic] fear, and in the commission of same did use a firearm.

(R. 213-14)

SENTENCING HEARING

At the sentencing hearing, the Court received proffers of evidence from the State and the defense (Plea Tr. 151).

The State proffered expert ballistics testimony to the effect that the first shot was fired from 24 to 30 inches away from the victim; that any one of the three bullets would have killed the victim; that the bleeding from the second and third gunshot wounds was consistent with cardiac activity continuing for a brief period after the first shot; and that the chances of surviving the first shot were "probably nil" (Plea Tr. 166-67).

The prosecutor indicated that the State was initially concerned that the shooting might indeed have been accidental (Plea Tr. 171). For this reason the State requested Northern to submit to a polygraph test. The test suggested that Northern had lied about certain facts, but was inconclusive because of a heart condition from which he suffered (Plea Tr. 171-72). The prosecutor stated that the prosecution team was "very concerned," since "[o]f course, we didn't want to ask [for] the death penalty if there was any possible chance that Mr. Phillips had accidentally discharged that weapon into Mr. Hamby" (Plea Tr. 173).

Confronted with that polygraph result, Northern confessed his involvement (Plea Tr. 174). He also confessed that he and defendant "discussed in some detail the possibilities of a robbery" and that defendant had indicated "that if a robbery went down they would in all probability have to shoot the witness, because Mr. Phillips didn't want any witness around to testify against him later on" (Plea Tr. 175-76).

The prosecutor reported that the polygraph "indicates that Mr. Northern did not see that first shot fired" (Plea Tr. 180). However, the first shot went into "the most vital portion of the person's body . . . traversing from right to left across the most vital areas of his brain and killing him." The prosecutor added, "The odds and probabilities of that on an accidental discharge in a fashion of which Mr. Phillips was robbing Mr. Hamby leads me to believe that the first shot was aimed" And of course, there was "no question that the second and third shots were intentionally fired" (Plea Tr. 181). Ballistics tests also indicated "a well aimed [first] shot" (Plea Tr. 191; see also Plea Tr. 192-195).

The prosecutor represented that defendant had brought with him a "black toilet paper roll" described by defendant as a silencer (Plea Tr. 183). However, the State stipulated that it was not used in the killing (Plea Tr. 271).

Defense counsel responded to this proffer. Mr. Iwasaki admitted that defendant "did fire those shots, and under circum-

stances which would lead one to believe that it was intentional and knowing" (Plea Tr. 199). He also attempted to discredit Northern's testimony (Plea Tr. 199-200). While not challenging the prosecutor's proffer, he cautioned the court that it was an oral proffer and urged the court "to look at all of the facts and circumstances, including the preliminary hearing transcript" (Plea Tr. 203). In addition, he argued that the facts of the case were "subject to different inferences and interpretations" (Plea Tr. 205).

The defense also called five prominent defense attorneys, a deputy county attorney, a psychologist who had evaluated Mr. Northern, and numerous family members. Except for the psychologist, who testified that Northern was a manipulative anti-social personality (Plea Tr. 212), these witnesses' testimony related to the death penalty and defendant's personal life.

At the conclusion the proffers and testimony, the court entered on the record its findings regarding aggravation and mitigation (Plea Tr. 302-09). With respect to the intentional nature of the killing, the court found as follows:

Third, there is substantial evidence in this case to show that the shooting was intentional, and not accidental as claimed by the defendant. Most of those factors which show the intentional nature of the act rather than its accidental occurrence I have already described [see Plea Tr. 301-03].

They have to do with the planning and the discussion by the parties of the crime, the existence and presence of the silencer on the person of the defendant on the evening of the

crime, the failure of the parties to hide their identification for the substantial period of time they were with the victim;

The fact that the defendant was out of a job and needed money, the fact that there were three shots fired, all of them in deadly locations on the victim's body, the fact which is undisputed, that the gun was loaded and the defendant's finger was on the trigger, that the victim was unarmed and cooperative;

The fact that the pressure needed to cause that gun to fire in its double action phase was at least 12 pounds, as my recollection of the evidence shows, the wipe-up of the fingerprints in the cab, fingerprinting and reloading of the gun, and the purchase of the shoulder holster the following day, the day following the crime, for purposes of carrying it more conveniently, the notch on the handle, and the newspaper article which I have already described.

(Plea Tr. 303-04, emphasis added).

The court sentenced defendant to a term of life imprisonment for the capital homicide and five years to life for the aggravated robbery (R. 222). The judge penned the following comment to the Board of Pardons on the Judgment and Commitment form:

This defendant deliberately and unnecessarily murdered an innocent victim for \$26.00, and attempted to convince the court that the act was accidental. I hope that he will not be released on parole after the statutory fifteen years, but that he will in fact serve a sentence which more closely resembles "life imprisonment."

(R. 223, emphasis added) (see Addendum "A").

MOTION TO WITHDRAW GUILTY PLEA

The record on appeal does not include a transcription of the hearing on defendant's motion to withdraw his guilty plea.³ The motion was apparently based primarily if not wholly on the transcript of the plea hearing, which was admitted into evidence (R. 250).⁴ Therefore, no facts were adduced at this hearing in addition to those summarized above.

SUMMARY OF ARGUMENT

1. Defendant contends that the trial court erred in refusing to set aside his guilty plea to first degree murder. This contention rests upon two stated grounds: (1) that defendant was not informed of potential defenses; and (2) that there was insufficient evidence of defendant's guilt.

Defendant offers no facts, argument, or analysis in support of his first contention. This Court should therefore disregard it.

³ It is well settled in this jurisdiction that "[i]f an appellant fails to provide an adequate record on appeal, [a reviewing court] must assume the regularity of the proceedings below." Jolivet v. Cook, 784 P.2d 1148, 1150 (Utah 1989) (quoting State v. Miller, 718 P.2d 403, 405 (Utah 1986)), cert. denied 493 U.S. 1033, 110 S. Ct. 751 (1990).

⁴ The record does not reflect that the transcript of the preliminary hearing was admitted into evidence, although it is included in the record on appeal. The State requests this Court to take judicial notice of its contents pursuant to Willett v. Barnes, No. 900344, slip op. at 4 (Utah Oct. 28, 1992) (Court took judicial notice of preliminary hearing transcript not included in the record on appeal).

In pressing his second contention, defendant ignores the overwhelming evidence of guilt presented or proffered in the preliminary hearing and the district court. Because he fails to marshal this evidence, his sufficiency argument fails.

Defendant's attempts to distinguish North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160 (1970) are unavailing. Like Alford, defendant pled guilty in the face of strong evidence of guilt. However, while Alford asserted his innocence under oath, defendant admitted his guilt under oath.

Finally, defendant's reliance upon State v. Breckenridge, 688 P.2d 440 (1983) is misplaced. Unlike that case, here the State produced overwhelming evidence of defendant's guilt. Furthermore, the issue of intent was exhaustively explored at the plea and sentencing hearings. Defendant admitted his guilt under oath and the court made findings to support its conclusion that the killing was intentional.

Judge Durham was careful to ensure that defendant's guilty plea was knowing, voluntary, and supported by substantial evidence of guilt. The trial court carefully reviewed this evidence and rendered its decision in a thoughtful and thorough memorandum decision. There was no abuse of discretion here.

ARGUMENT

BECAUSE IN 1980 DEFENDANT PLED GUILTY VOLUNTARILY AND WITH A CLEAR UNDERSTANDING OF THE CHARGE, THE TRIAL COURT IN 1992 PROPERLY DENIED HIS MOTION TO WITHDRAW THE GUILTY PLEA

"A plea of guilty . . . may be withdrawn only upon good cause shown and with leave of the court." Utah Code Ann. § 77-13-6(2)(a) (1990). A "withdrawal of a plea of guilty is a privilege, not a right . . . [and] is within the sound discretion of the trial court." State v. Gallegos, 738 P.2d 1040, 1041 (Utah 1987).

Defendant has not clearly articulated the legal basis for his claim on appeal. He does not cite the federal or state constitutions, and he admits that rule 11, Utah Rules of Criminal Procedure, does not control.⁵ The State will therefore treat his appeal as premised solely upon section 77-13-6(2)(a)'s "good cause" requirement.

Good cause exists where a plea was entered involuntarily or without a clear understanding of the charge. State v. Thorup, No. 920404-CA, slip op. at 3 (Utah App. Nov. 13, 1992). Defendant argues good cause based upon two contentions: (1) that

⁵ Defendant's original motion relied upon rule 11 of the Utah Rules of Criminal Procedure and cases construing it (R. 232-33). However, defendant now concedes that since he pled guilty on June 16, 1980, and the rule did not become effective until July 1, 1980, rule 11 does not control (Br. of App. 9; see also R. 242-43 [State's memorandum]; R. 253-54 [Memorandum Decision]). See Halliday v. United States, 394 U.S. 831, 833, 89 S. Ct. 1498, 1499 (1969) (federal rule 11 is inapplicable to pleas entered before its effective date).

defendant was not informed of potential defenses; and (2) that there was insufficient evidence of defendant's guilt.

A. Defendant Waived Any Issue Involving Potential Defenses.

Defendant claims that the trial court erred by not permitting defendant to withdraw his guilty plea on the ground that "defendant was not fully informed of his defenses" (Br. of App. 6). However, defendant has never fully articulated this argument. He has never identified the defenses of which he should have been informed, nor has he cited any authority requiring the court to inform him of them.

Where a brief "wholly lacks legal analysis and authority to support [an] argument," a reviewing court "must disregard this issue." State v. Wareham, 772 P.2d 960, 966 (Utah 1989). See also State v. Amicone, 689 P.2d 1341, 1344 (Utah 1984); State v. Reiners, 803 P.2d 1300, 1301 n.2 (Utah App. 1990). This Court must accordingly disregard defendant's first point on appeal.

B. The State Proffered Overwhelming Evidence of Defendant's Guilt, But Defendant Fails to Marshal It.

In its memorandum decision denying the motion to withdraw, the court relied upon Strong v. Turner, 22 Utah 2d 294, 452 P.2d 323 (Utah 1969) as the authority controlling at the time of defendant's guilty plea (R. 253-54). Strong required that a guilty plea be made "voluntarily" and "with a clear understanding of what the charge is . . ." 22 Utah 2d at 296 & 296 n.2, 452 P.2d at 324 & 324 n.2. Based on the facts set forth above, the

court concluded that "the court [accepting the plea] was able to determine defendant was admitting an intentional act notwithstanding his earlier claim of accident" (R. 254).

Defendant asserts that "the proffer of evidence produced regarding the facts that existed does not establish intent" (Br. of App. 9). Consequently, he argues, "there would have been no reason for Defendant to plead guilty to murder when it was not committed, unless he believed through misapprehension of nature and element of crime [sic], that he had committed it intentionally" (Br. of App. 11).

This argument is in effect a sufficiency challenge to the trial court's ruling. In order to mount such a challenge, an appellant must marshal all the evidence in support of the trial court's verdict and then demonstrate that "the evidence, including all reasonable inferences drawn therefrom, is insufficient to support the findings against an attack." State v. Moosman, 794 P.2d 474, 475-76 (Utah 1990); accord State v. Chavez, No. 910723-CA, slip op. at 5 (Utah App. Oct. 22, 1992).

In 1980, the State presented and proffered overwhelming evidence of defendant's guilt and of his understanding of the intent issue. The trial court was aware of the intent issue when it accepted defendant's plea and held his sentencing hearing. It ensured that defendant understood that he was pleading guilty to an intentional killing and that the evidence against him was strong (see pp. 5-12 herein). The court reviewed the transcript

of the preliminary hearing and heard detailed proffers of the evidence against defendant, including evidence of his intent to kill (see pp. 12-14 herein). Finally, Judge Durham entered in the record extensive findings of fact on this very issue, concluding that the killing was intentional (see pp. 14-16 herein).

In 1992, the trial court found that "defendant's voluntary and knowing plea of guilty was verified on the record in an exchange between the defendant and the court" (R. 254) (Addendum "B"). It further found that the plea affidavit "was a crucial and inextricable part of the colloquy," and that "[b]y inquiring of the defendant two separate times about the affidavit, the court was able to determine defendant was admitting an intentional act notwithstanding his earlier claim of accident" (id.). Finally, the trial court found that "[e]ven after defendant indicated the death was accidental and not intentional, he repeated his concurrence with his counsel's view that evidence of intent existed" (R. 255).

Because defendant fails to marshal or even acknowledge these findings and the extensive evidence supporting them, he falls short of demonstrating the trial court abused its discretion in denying his motion to withdraw his guilty plea.

C. Defendant's Guilty Plea Was Proper Under North Carolina v. Alford.

As a "wholly independent basis" for its ruling, the trial court relied upon North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160 (1970). Alford testified at his plea hearing "that he

had not committed the murder but that he was pleading guilty because he faced the threat of the death penalty if he did not do so." 400 U.S. at 28, 91 S. Ct. at 162-63. The United States Supreme Court held that "an express admission of guilt . . . is not a constitutional requisite to the imposition of criminal penalty." A guilty plea may be constitutionally entered where "a defendant intelligently concludes that his interests require entry of a guilty plea and the record before the judge contains strong evidence of actual guilt." 400 U.S. at 37, 91 S. Ct. at 167; see also Hurst v. Cook, 777 P.2d 1029, 1038 (Utah 1989) ("an accused can lawfully plead guilty to an offense for which he could not have been convicted if the plea is in exchange for a lesser sentence"). The court found that defendant, after consultation with his counsel, acknowledged that he would likely be found guilty of first degree murder (R. 255).

Defendant attempts to distinguish Alford on the ground that "there is no strong evidence of guilt" in his case (Br. of App. 7). Again, this is essentially a sufficiency challenge in which defendant fails to marshal the supporting evidence as required by Moosman and Chavez. His claim therefore fails.

It fails on the merits as well. At the preliminary hearing, at the plea hearing, and at the sentencing hearing, the State presented and proffered overwhelming evidence of defendant's guilt (see pp. 3-15 herein). Unlike Alford, who asserted

his innocence under oath, defendant admitted his guilt under oath (see pp. 10-12 herein).

In view of defendant's desire to plead guilty and the strong evidence of guilt before the trial court, the trial court did not abuse its discretion in concluding that Alford provides a sufficient basis for defendant's guilty plea.

D. State v. Breckenridge Does Not Assist Defendant.

Finally, defendant's reliance upon State v. Breckenridge, 688 P.2d 440 (1983) on appeal is misplaced. First, this is a new argument, asserted for the first time on appeal (see R. 227-34), and should be rejected on that ground alone. State v. Anderson, 789 P.2d 27, 29 (Utah 1990).

Second, Breckenridge is inapposite. Although Breckenridge pled guilty to arson, the only facts presented to the trial court indicated that Breckenridge accidentally started the fire. The supreme court stated, "the record recites no factual basis from which we might conclude that an arson ever occurred." Breckenridge, 688 P.2d at 443. On the contrary, the facts suggested that Breckenridge had no reason to plead guilty other than a mistaken belief that he had committed the crime. Id. The court held that Rule 11(e)(4), Utah Rules of Criminal Procedure, and article I, section 7 of the Utah Constitution required withdrawal of the plea. Id. at 444.

Defendant here has not asserted a constitutional violation and rule 11 does not apply. But factual differences between the two cases run deeper even than these legal ones.

The State here presented or proffered overwhelming evidence that defendant intentionally killed Everett Hamby. Even defense counsel admitted that defendant "did fire those shots, and under circumstances which would lead one to believe that it was intentional" (Plea Tr. 199). Defendant knowingly pled guilty in order to reduce the risk of receiving the death penalty, as is his right. See Alford, 400 U.S. at 28, 91 S. Ct. at 162-63.

Most significantly, the court receiving Breckenridge's guilty plea failed to make an explicit record finding that Breckenridge understood the nature and elements of arson. Id. at 443. Here, defendant raised the intent issue in the plea hearing. The trial court exhaustively explored it with counsel and with defendant; inquired into why defendant was pleading guilty; questioned whether he agreed that there was evidence of intent and that he would probably be found guilty; had him personally affirm in open court the contents of his plea affidavit, then repeat his answers under oath; and entered findings supporting its conclusion that the killing was intentional.

In sum, the record is replete with evidence of defendant's guilt and with evidence that he knowingly and voluntarily entered his plea of guilty. Two district judges have reached these conclusions without difficulty. On this record, the defer-

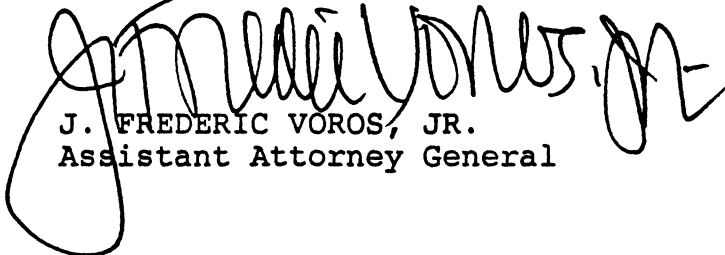
ential review required by State v. Trujillo-Martinez, 814 P.2d 596, 599 (Utah App. 1991) and State v. Mildenhall, 747 P.2d 422, 424 (Utah 1987) is amply merited.

CONCLUSION

Based on the foregoing, the State respectfully requests that this Court affirm the trial court's denial of defendant's motion to withdraw his plea of guilty.

RESPECTFULLY submitted on November 25, 1992.

R. PAUL VAN DAM
Attorney General



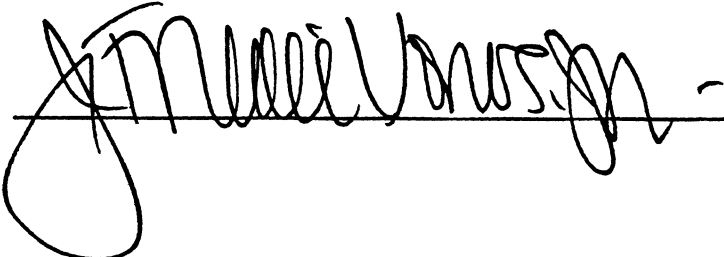
J. FREDERIC VOROS, JR.
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of the foregoing Brief of Appellee were mailed on November 25, 1992 to the following:

PAUL GOTAY
Attorney at Law
5085 South State Street
Murray, Utah 84107

Attorney for Appellant



ADDENDA

ADDENDUM A

Judgment and Commitment (1980)

TED CANNON
Salt Lake County Attorney
By: GREGORY L. BOWN
Deputy County Attorney
C-220 Metropolitan Hall of Justice
Salt Lake City, UT 84111
Telephone: 535-6130

SALT LAKE COUNTY CLERK
JUN 11 9 31 AM '80
J. STEPLING EVANS, CLERK
3RD DIST. COURT
BY *[Signature]*
DEPUTY CLERK



IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE STATE OF UTAH)	
Plaintiff)	
vs)	JUDGMENT AND COMMITMENT
ROBERT PHILLIPS ³⁸⁸)	
Defendant)	Case No. CR-80-296

On the 23rd day of June, 1980, appeared Michael J. Christensen, the attorney for the State of Utah, and the defendant appeared in person and by counsel, Glenn K. Iwasaki and Fred Metos.

IT IS ADJUDGED that the defendant has been convicted upon a plea of guilty of the offense of Criminal Homicide, Murder in the First Degree, a capital offense, as charged in Count I of the Information; and upon a plea of guilty of the offense of Aggravated Robbery, a first degree felony, as charged in Count II of the Information; and the Court having asked if the defendant has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant be confined and imprisoned at the Utah State Prison for the indeterminate term of life imprisonment, and is not fined as provided by law for the crime of Criminal Homicide, a capital offense, as charged in Count I of the Information; and that the defendant be confined and imprisoned at the Utah State Prison for the indeterminate term of not less than five years and which may be for life, and is not fined as provided by law for the crime of Aggravated Robbery, a first degree felony, as charged in Count II

Transported by
Ballard 7.7.80

of the Information. Commitment shall issue forthwith. Such sentences to run concurrently.

IT IS ORDERED that N. D. Hayward, Sheriff of Salt Lake County, State of Utah, take the said defendant, Robert A. Phillips, and deliver said defendant without delay to the Utah State Prison, Draper, Utah, where said defendant shall then and there be confined and imprisoned in accordance with this Judgment and Commitment.

DATED this 1st day of ^{July}~~June~~, 1980.

BY THE COURT

ATTEST
W. STERLING EVANS
CLERK

BY Chas. Simpson
Deputy Clerk

Christine M. Durham

CHRISTINE M. DURHAM, Judge

Pursuant to the provisions of Section 77-35-21, Utah Code Annotated, 1953 as amended, and in accordance with the guidelines developed conjointly between the Courts and the Board of Pardons, I recommend that the defendant serve in excess of fifteen years ~~months~~ prior to release or parole.

Imprisonment is ordered in deviation from the guidelines because

Comments, including mitigating or aggravating circumstances:

This defendant deliberately and unmercifully murdered an innocent victim for \$26.00, and attempted to convince the court that the act was accidental. I hope that he will not be released

DATED this 1st day of ^{July}~~June~~, 1980.

BY THE COURT

ATTEST
W. STERLING EVANS
CLERK

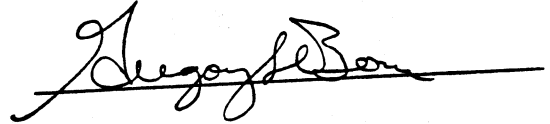
BY Chas. Simpson
Deputy Clerk

Christine M. Durham
*on parole after the
statutory fifteen
years, but that
he will in fact
serve*

CHRISTINE M. DURHAM, Judge

*a sentence
which more
closely resembles
"life imprisonment."*

Mailed a copy of the foregoing Judgment and Commitment this 26th day of June, 1980, to Glenn K. Iwasaki and Fred Metos, Attorneys for Defendant, 333 South 200 East, Salt Lake City, UT 84111.

A handwritten signature in cursive script, appearing to read "Gregory B. Ben", written over a horizontal line.

ADDENDUM B

Memorandum Decision and Order Denying Motion
to Withdraw Plea (1992)

MAY 12 1992

By M. A. B. B. SALT LAKE COUNTY
Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE STATE OF UTAH,	:	MEMORANDUM DECISION
	:	AND ORDER
Plaintiff,	:	
vs.	:	CASE NO. 801902961
ROBERT ALAN PHILLIPS,	:	
Defendant.	:	

Defendant Robert Alan Phillips has moved to withdraw his 1980 plea of guilty to first degree murder, a capital offense, and aggravated robbery. Defendant's focus is on the first of the two charges. The State promised not to make an impassioned argument for imposition of the death penalty in exchange for defendant's plea of guilty to the first degree murder charge.

At a hearing on June 16, 1980, the plea arrangement was presented to the district judge. An inextricable part of the proposed plea was defendant's affidavit which was apparently prepared for him by counsel. In the affidavit the defendant stated he knew the State must prove each element beyond a reasonable doubt (para. 3), admitted his guilt generally (para.

000252

6), and specifically admitted that he intentionally and knowingly caused the death of the victim (para. 12).

During the colloquy with the judge, defendant denied he intentionally caused the death of the victim asserting that the death was accidental. Defendant's counsel immediately indicated that there was evidence from which intent could be inferred. The Court then asked the defendant if he disagreed with his counsel's comment on the evidence. Defendant's response was unequivocal: "No". (Tr. pp. 9-10). It was only after this specific colloquy that the court made inquiry of the defendant concerning the affidavit. The defendant orally verified he had read the affidavit, understood its contents, that the affidavit was true and accurate and that his plea decision was voluntary. Only after this oral verification did the defendant sign the affidavit. The court then had the defendant sworn and he again stated he had read the affidavit, understood its contents, that the affidavit was true and correct and that his decision to plead guilty was voluntary (Tr. 14-15).

Rule 11, Utah Rules of Criminal Procedure, was enacted in the 1980 legislative session and was not effective until July 1, 1980. Laws of Utah, 19890 Ch. 14, Section 1. As a

000253

consequence, it is inapplicable to the plea in this case which was entered June 16, 1980. The applicable standard was articulated in Strong v. Turner, 22 Utah 2d 294, 452 P.2d 323, 324 (1969). There the Court indicated that a plea must be made voluntarily and with a clear understanding of the charge. As required by Boykin v. Alabama, 395 U.S. 238 (1969), defendant's voluntary and knowing plea of guilty was verified on the record in an exchange between the defendant and the court. The affidavit of defendant was a crucial and inextricable part of the colloquy. By inquiring of the defendant two separate times about the affidavit, the court was able to determine defendant was admitting an intentional act notwithstanding his earlier claim of accident.

There is a wholly independent basis not presented by the State to deny the motion to withdraw the plea. Before the court engaged the defendant in the above-referenced colloquy, the defendant in response to a question from his counsel confirmed that he was pleading guilty because the State would then agree not to demand the death penalty (Tr. p. 8). The court then asked the defendant whether he believed, after consultation with counsel, that it was likely he would be convicted of the capital offense. Defendant's response was an

000254

unequivocal "yes". (Tr. 8). Even after defendant indicated the death was accidental and not intentional, he repeated his concurrence with his counsel's view that evidence of intent existed. (Tr. pp. 9-10).

These facts are remarkably similar to those in North Carolina v. Alford, 400 U.S. 25 (1970) where the defendant entered a plea of guilty while not factually acknowledging guilt in order to avoid the death penalty. Under those circumstances and where there was strong evidence of guilt, the Court found the plea to be a voluntary and knowing one. In the instant case the defendant confirmed his counsel's view that he would likely be found guilty of the capital offense. As a consequence, defendant's plea was appropriate.

For the foregoing reasons, defendant's motion to withdraw his plea is denied.

Dated this 12th day of May, 1992.


MICHAEL R. MURPHY
DISTRICT COURT JUDGE

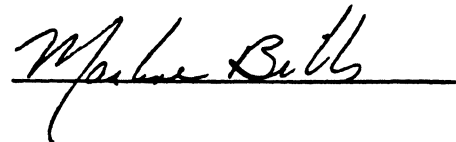
000255

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision and Order, to the following, this 12th day of May, 1992:

Walter R. Ellett
Deputy County Attorney
Attorney for Plaintiff
231 East 400 South, Suite 300
Salt Lake City, Utah 84111

Paul Gotay
Attorney for Defendant
5085 S. State Street
Murray, Utah 84107

A handwritten signature in cursive script, appearing to read "Michael Butts", is written over a horizontal line.

000256

ADDENDUM C

Plea Colloquy (1980)

1 SALT LAKE CITY, UTAH; MONDAY, JUNE 16, 1980; 11:53 A.M.

2 -oOo-

3
4 THE COURT: We will go on the record in the case of The
5 State of Utah vs. Robert Alan Phillips, Criminal No. CR80-296.

6 Is it Phillip or Phillips?

7 MR. IWASAKI: Phillips, Your Honor.

8 THE COURT: Let the record show he is present in the
9 courtroom represented by counsel, Mr. Iwasaki and Mr. Fred
10 Metos. The State of Utah is represented by Mr. Michael
11 Christensen.

12 Are there any other appearances?

13 MR. CHRISTENSEN: Leon Dever for the State also, Your
14 Honor.

15 THE COURT: All right. Thank you very mch.

16 This matter was scheduled to begin a trial today;
17 however, I understand from discussions of counsel that an
18 arrangement for the entry of a plea has been discussed and
19 negotiated between the parties and that the court's approval
20 for that arrangement will be sought here today. Is that
21 correct?

22 MR. IWASAKI: That is correct, Your Honor. We intend
23 at this time to have Mr. Phillips move the court to allow us
24 to withdraw our previously entered pleas of not guilty to the
25 crimes of criminal homicide, murder first degree, and aggra-

1 vated robbery, murder -- aggravated robbery a first degree
2 felony, to enter pleas of guilty to the charges as contained
3 in the Information.

4 THE COURT: All right.

5 MR. IWASAKI: Prior to that, I believe the State would
6 like to orally proffer to the court a stipulation which will
7 be reduced to writing, which we will return to the court at
8 1:30, as to arrangements concerned with the plea.

9 THE COURT: All right. Thank you.

10 MR. CHRISTENSEN: I will, Your Honor. We are in the
11 process right now of doing an informal document for the court.
12 But essentially, the plea, the stipulation, the understanding
13 with respect to the plea, would read as follows:

14 Comes now the State of Utah, by and through myself
15 and Ted Cannon, and hereby agrees that in exchange for the
16 defendant's plea of guilty as charged in the Information the
17 State agrees to act as following in the penalty phase of the
18 above-entitled matter:

19 1. The State will submit to the trial judge all
20 statements, reports, preliminary hearing transcripts, and all
21 other documentary evidence, including affidavits as the par-
22 ties deem appropriate, for full and fair consideration of the
23 appropriateness of the penalty of death in the above-entitled
24 matter.

25 2. In addition to the above, the State will

1 present to the court all evidence it finds relevant concern-
2 ing both guilt and aggravation;

3 3. Will indicate to the court what the State
4 finds to be the natural inferences and consequences of the
5 factual matters presented both orally or with respect to the
6 matters submitted in pursuance of Paragraph 1.

7 4. We will advise the court that in the opinion
8 of the State the case is one for which capital punishment may
9 be legally justified, but the State will not make an
10 impassioned plea for the imposition of the death penalty,
11 rather that such a matter is appropriately left to the dis-
12 cretion of the court based upon the submitted evidence of
13 guilt of aggravation and mitigation.

14 5. The State will answer all inquiries of the
15 court as candidly as possible and as consistent as possible
16 with the above paragraphs.

17 Dated and signed.

18 THE COURT: Thank you very much.

19 Are we prepared, then, to discuss the entry or the
20 change of the defendant's plea in the entry of his plea of
21 guilty here today?

22 MR. IWASAKI: We are, Your Honor.

23 THE COURT: Thank you.

24 I think the defendant had better come forward.

25 Mr. Iwasaki and Mr. Metos, as the defendant's

1 attorneys, I would like to ask you a few questions before I
2 question the defendant respecting his entry of the plea.

3 MR. IWASAKI: Certainly.

4 THE COURT: Have you explained to the defendant fully
5 and completely, to the best of your ability, the nature of the
6 charges that have been lodged against him in this matter?

7 MR. IWASAKI: I am satisfied, in my opinion, that Mr.
8 Metos and I have spent considerable time with Mr. Phillips
9 regarding the ramifications of his entry of the plea and also
10 the ramifications of the possible penalty he is facing.

11 In that regard, Your Honor, I have taken the
12 liberty to prepare an affidavit for the defendant which is
13 similar to those that we have used consistently in the court,
14 with minor changes. One of the changes which I would like to
15 indicate to the court at this time, and of which Mr. Phillips
16 is aware, is regarding the paragraph on appeal rights, waiving
17 the rights on appeal.

18 Mr. Phillips does understand that he is waiving
19 his rights as to his guilt by entry of this plea. However, as
20 the constitutional ramifications of the Utah death penalty
21 statute, I believe that is still an open question, and Mr.
22 Phillips, it is his understanding that he will preserve his
23 rights as to those constitutional issues on the death penalty,
24 but does in fact waive his right to an appeal as to the guilt
25 aspect of it.

1 With the minor changes, we have gone over this
2 affidavit of the defendant with Mr. Robert Alan Phillips in
3 detail. I have previously affixed my signature, as has Fred
4 Metos and Michael Christensen, the prosecuting attorney.

5 I believe Mr. Phillips is fully aware of what is
6 contained in that affidavit and at this time knows what all is
7 occurring before Your Honor. And any questions that he has, I
8 think, have been fully answered and discussed by both Mr.
9 Metos and myself.

10 Fred, do you have anything to add for the record?

11 MR. METOS: No, I don't.

12 THE COURT: All right. Thank you very much, Mr.
13 Iwasaki. Based upon that, I would now like to ask the defend-
14 ant a number of questions.

15 Mr. Phillips, I would like to know first how old
16 you are and how much education you have.

17 THE DEFENDANT: I am 26, and I have got a GED. I went
18 through the tenth grade and was in the eleventh when I quit.

19 THE COURT: All right. And do you read and understand
20 the English language?

21 THE DEFENDANT: Yes, ma'am.

22 THE COURT: Without any problems?

23 THE DEFENDANT: Yes, ma'am.

24 THE COURT: All right. Have you had an opportunity to
25 read through the affidavit that Mr. Iwasaki has prepared for

1 your use in these proceedings?

2 THE DEFENDANT: Yes, ma'am, I did.

3 THE COURT: Do you believe that you understand the
4 contents of that affidavit?

5 THE DEFENDANT: Yes, ma'am.

6 THE COURT: Do you understand that you have a number of
7 rights, if you take these charges to trial before a jury, that
8 are explained and discussed in that affidavit?

9 THE DEFENDANT: Yes, ma'am.

10 THE COURT: All right. Specifically, I would like to
11 inquire, inasmuch as you have apparently decided to plead as
12 charged, whether you are aware that if you took these charges
13 to trial that you would have the right to have the State
14 required to prove to the jury's satisfaction each and every
15 one of the essential elements of the charges beyond a
16 reasonable doubt?

17 THE DEFENDANT: Yes, ma'am, I do.

18 THE COURT: All right. And you understand, further,
19 that you would have rights to confront the witnesses against
20 you and to have your counsel cross examine them on your
21 behalf, and so forth?

22 THE DEFENDANT: Yes, ma'am.

23 THE COURT: All right. Can you explain to the court in
24 your own words why you have decided to plead guilty to these
25 charges?

1 THE DEFENDANT: Well, I feel that it is being the best
2 of justice, actually.

3 THE COURT: How is it in the best interest of you is
4 what I am concerned about.

5 THE DEFENDANT: I am going to get some assistance in
6 furthering my education or helping myself, to better myself,
7 whereas I can help others.

8 MR. IWASAKI: That is not the question, Mr. Phillips.
9 The question was in light of everything that we have all
10 discussed, and in light of your involvement in this matter,
11 why are you changing your plea to guilty rather than retain-
12 ing a not guilty posture? Why are you pleading guilty today?

13 THE DEFENDANT: I am not sure.

14 MR. IWASAKI: Did we not discuss what the State was
15 going to do at the penalty phase is to not ask for the death
16 penalty, per se, by at least putting in facts before the court
17 as to what they believed the facts to be?

18 THE DEFENDANT: Yes.

19 MR. IWASAKI: Did we not discuss that?

20 THE DEFENDANT: Yes, we did.

21 MR. IWASAKI: And is the Information that -- Is that one
22 of the reasons why you are changing the plea, because the
23 county attorney's office has stated that they would not demand
24 that you be executed?

25 THE DEFENDANT: Yes.

1 MR. IWASAKI: But rather, submit it to the court?

2 THE DEFENDANT: Yes. That is true.

3 THE COURT: All right.

4 Mr. Phillips, did you --

5 MR. METOS: May I also add, Your Honor, --

6 You are also aware, Robert, of the state of the
7 evidence and we have discussed the chances of your being found
8 guilty of a lesser offense and being found guilty of the
9 offense that is charged?

10 THE DEFENDANT: Yah. We have gone through that.

11 THE COURT: All right. After having gone through that
12 with your counsel, Mr. Phillips, do you have an opinion about
13 the evidence against you? Do you think that you are likely to
14 be convicted of the greater offense?

15 THE DEFENDANT: Yes, ma'am. Yes, ma'am, I do.

16 THE COURT: All right. And we will be spending consid-
17 erable time, I think, reviewing that evidence, although, as I
18 understand it, the defendant's plea is entered.

19 And Mr. Phillips, I need you to indicate to me if
20 you are entering your plea of guilty because you are in fact
21 guilty of the offenses that are charged in the Information.

22 THE DEFENDANT: Yes, ma'am, I am.

23 THE COURT: All right. Specifically, the Information
24 alleges that on or about January 1st, 1980, here in Salt Lake
25 County, you caused the death of Everett Hamby, Jr. while you

1 were engaged in the commission of an aggravated robbery?

2 THE DEFENDANT: Yes, ma'am.

3 THE COURT: Are those facts true and correct?

4 THE DEFENDANT: Yes, ma'am.

5 THE COURT: All right. And did you cause his death
6 knowingly and intentionally at that time?

7 THE DEFENDANT: Not intentionally. It was accidental.
8 But I was still at fault.

9 THE COURT: All right.

10 With respect to the intentional part, I will need
11 a proffer from counsel respecting the facts that exist to
12 establish intent.

13 MR. IWASAKI: Your Honor, the facts would indicate that
14 Mr. Hamby was shot once in the back of the head, a bullet
15 going from right to left in an area about a centimeter above
16 the top of his ear, exiting approximately -- atop of his right
17 ear, exiting approximately the middle of the temporal bone on
18 his left ear.

19 Further, the evidence will show, and Mr. Phillips
20 has subsequently confessed to the -- that a second and third
21 shot were placed into the body by Mr. Phillips.

22 Based upon Mr. Phillips' inability to explain the
23 reasons why the second and third shot were fired, it is our
24 opinion, Mr. Metos and myself, that, with a hurdle to pass,
25 the facts would indicate an intentional nature, although in

1 Mr. Phillips' own mind there is some question as to whether or
2 not the first shot was intentional. However, the other two
3 shots, the unexplainability of those other two shots, would
4 indicate from circumstantial evidence his intentional nature
5 of them.

6 THE COURT: All right.

7 Mr. Phillips, do you disagree in any way with what
8 Mr. Iwasaki has said about what the evidence would show?

9 THE DEFENDANT: No. No, ma'am.

10 THE COURT: All right.

11 In Count II of the Information you are charged on
12 the same day with having unlawfully and intentionally taken
13 personal property from the possession or the control of
14 Everett Hamby, Jr. against his will by the use of force or
15 fear. Do you admit to those facts as well?

16 THE DEFENDANT: Yes, ma'am, I do.

17 THE COURT: All right. And do you admit to the intent
18 with respect to those facts? Do you acknowledge that you
19 intended to take the property from his possession with the use
20 of force or fear or a firearm?

21 THE DEFENDANT: Yes, ma'am.

22 THE COURT: All right. Have you had a chance, Mr.
23 Phillips, to discuss as fully and completely as you desire,
24 your decision to plead guilty with your attorneys, Mr. Metos
25 and Mr. Iwasaki?

1 THE DEFENDANT: Yes, ma'am, I do.

2 THE COURT: Are you satisfied with the advice and the
3 counsel that they have given to you?

4 THE DEFENDANT: Yes, ma'am.

5 THE COURT: Do you have any questions for the court now
6 that you would like to discuss?

7 THE DEFENDANT: No, ma'am.

8 THE COURT: All right. I am specifically concerned that
9 you understand that all the State has agreed to do in return
10 for your guilty plea, and, frankly, it is not very much, they
11 have not reduced the charges, they have not agreed even to
12 stipulate to a lower penalty. All they have agreed to do is
13 not strenuously argue in favor of the imposition of the death
14 penalty.

15 All right. Do you understand that their agreement
16 not to argue strenuously in favor of the death penalty is in
17 no way binding upon this court, and in fact could be entirely
18 ignored by this court at the time of the sentencing phase of
19 this proceeding, and that the court could, based on the evi-
20 dence before it, and in fact might impose the capital penalty
21 that is provided by law; that is, the death penalty?

22 THE DEFENDANT: Yes, ma'am. I understand that.

23 THE COURT: All right. So you understand very clearly
24 that all you are getting in return for this plea is the
25 silence of the State?

1 THE DEFENDANT: Yes, ma'am.

2 THE COURT: And that is only at the argument phase.

3 They are still going to put on evidence, as I understand it,

4 that would justify and substantiate the imposition of a death

5 penalty.

6 THE DEFENDANT: Yes, ma'am.

7 THE COURT: All right. Is there anything about your

8 condition here today, Mr. Phillips, that might impair your

9 ability to think carefully about this decision? Are you in a

10 good frame of mind?

11 THE DEFENDANT: Yes, ma'am.

12 THE COURT: Do you understand what's going on?

13 THE DEFENDANT: Yes.

14 THE COURT: Are you taking any drugs or medication for

15 any purpose?

16 THE DEFENDANT: I am taking medication to help me sleep

17 at night.

18 THE COURT: What is that?

19 THE DEFENDANT: I couldn't tell you the name of it. I

20 have been trying to get the name of the medication from the

21 doctor.

22 THE COURT: All right.

23 THE DEFENDANT: Since I have been incarcerated.

24 THE COURT: Does it affect your ability to function

25 during the day at all?

1 THE DEFENDANT: No, ma'am.

2 THE COURT: All right. And do you believe you are in
3 full control of yourself and your faculties here today?

4 THE DEFENDANT: Yes, ma'am, I do.

5 THE COURT: All right. I would like you now to sign
6 that affidavit that is before you on the podium that Mr.
7 Iwasaki has prepared and that we have discussed here, and I
8 want you to sign it as an indication, number one, that you
9 have read it; number two, that you understand its contents;
10 number three, that everything that is in its contents is true
11 and accurate and correct as far as you know; and number four,
12 and most important, that your decision to enter this plea of
13 guilty is freely and voluntarily made, that nobody's threat-
14 ened you or promised you anything except what we have talked
15 about, the State not arguing strenuously, and that you desire
16 to plead guilty yourself.

17 THE DEFENDANT: Yes, ma'am.

18 THE COURT: Are all of those things true?

19 THE DEFENDANT: Yes, ma'am, they are.

20 THE COURT: All right. Would you sign the affidavit now
21 in open court, please.

22 MR. IWASAKI: Sign your full name.

23 (Defendant complies.)

24 MR. IWASAKI: As previously stated, Your Honor, Mr.
25 Metos and myself and Mr. Christensen have signed this already.

1 THE COURT: All right. May I see it?

2 (Affidavit submitted to the court.)

3 THE COURT: Although I don't ordinarily require the
4 formality of having the witness sworn in connection with the
5 affidavit, I think in this case I would prefer to do that.

6 MR. IWASAKI: I would agree, Your Honor.

7 THE COURT: Would you raise your right hand, please, Mr.
8 Phillips. And what I want you to do is take an oath on the
9 record with respect to the truthfulness of your statements as
10 contained in this affidavit.

11 THE CLERK: Do you solemnly swear the testimony you are
12 about to give in the matter now before the court will be the
13 truth, the whole truth, and nothing but the truth, so help
14 you, God?

15 THE DEFENDANT: I do.

16 THE COURT: All right. Thank you.

17 Mr. Phillips, you are now formally and officially
18 under oath, and I would like you to reaffirm your answer to
19 the questions which I have just asked you; namely, does your
20 signature on this affidavit represent the fact that, number
21 one, you have read it?

22 THE DEFENDANT: Yes, ma'am.

23 THE COURT: Number two, that you understand it?

24 THE DEFENDANT: Yes, ma'am.

25 THE COURT: Number three, that its contents are true and

1 correct?

2 THE DEFENDANT: Yes, ma'am.

3 THE COURT: And number four, that your decision to plead
4 guilty is made of your own free will and choice?

5 THE DEFENDANT: Yes, ma'am.

6 THE COURT: All right. Thank you very much.

7 Having heard the defendant's affirmation of his
8 now sworn statements in the affidavit, and having reviewed the
9 affidavit, based upon its contents and his reponses to my
10 questions here in open court, I find that his plea of guilty
11 to two charges, one of criminal homicide, murder in the first
12 degree, and one of aggravated robbery, a first degree felony,
13 is freely and voluntarily made. I will order that it be
14 accepted and entered in the record of the court.

15 Having done that, we need to move on to the sen-
16 tencing phase of the hearing. And the statute requires me to
17 sentence you in no less than two nor more than ten days from
18 today's date.

19 I don't know whether the statute actually provides
20 for a capital homicide hearing under these circumstances.
21 Ordinarily that phase would begin immediately after the
22 verdict and the entry of the verdict.

23 MR. METOS: Well, as I read the capital sentencing phase
24 statute, I think it is 76-302, says that upon conviction a
25 hearing shall be held. It doesn't specify a time period.

ADDENDUM D

Plea Affidavit (1980)

[FILMED]

GLENN K. IWASAKI
G. FRED METOS
Salt Lake Legal Defender Assoc.
Attorneys for Defendant
333 South 200 East
Salt Lake City, Utah 84111
Telephone: 532-5444

FILED IN CLERK'S OFFICE
Salt Lake City, Utah

JUN 21 1980

W. Sterling Evans, Clerk, 3rd Dist. Court
By *Chet H. [Signature]* Gen. Inv. Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT, IN AND FOR

SALT LAKE COUNTY, STATE OF UTAH

THE STATE OF UTAH,	:	AFFIDAVIT OF DEFENDANT
Plaintiff,	:	
-v-	:	
ROBERT ALAN PHILLIPS,	:	Case No. CR 80-296
Defendant.	:	

I, ROBERT ALAN PHILLIPS, the above named defendant, under oath, hereby acknowledge that I have entered a plea of guilty to the charges of CRIMINAL HOMICIDE, MURDER, FIRST DEGREE and AGGRAVATED ROBBERY contained in the Information on file against me in the above-entitled court, a copy of which I have received. That I understand the charges to which this plea of guilty is entered are a capital crime and a felony of the first degree, and that I am entering such a plea voluntarily and of my own free will after conferring with my attorneys, GLENN K. IWASAKI and G. FRED METOS and with the knowledge and understanding of the following facts:

1. I know that I have a constitutional right under the Constitution of Utah and the United States to plead not guilty and to have a jury trial upon the charges to which I have entered a plea of guilty, or to a trial by the court should I elect to waive a trial by jury. I know I have a right to be represented by counsel and that I am in fact represented by GLENN K. IWASAKI and G. FRED METOS as my attorneys.
2. I know that if I wish to have a trial in court upon the charges, I have a right to be confronted by the witnesses against me by having them testify in open court in my presence and before

the court and jury with the right to have those witnesses cross examined by my attorney. I also know that I have a right to have witnesses subpoenaed by the State at its expense to testify in court upon my behalf and that I could, if I elected to do so, testify in court on my own behalf, and that if I choose not to do so, the jury can and will be told that this may not be held against me if I choose to have the jury so instructed.

3. I know that if I were to have a trial that the State must prove each and every element of the crimes charged to the satisfaction of the court or jury beyond a reasonable doubt; that I would have no obligation to offer any evidence myself; and that any verdict rendered by a jury whether it be that of guilty of not guilty must be by a unanimous agreement of all jurors.
4. I know that under the Constitutions of Utah and of the United States that I have a right against self-incrimination or a right not to give evidence against myself and that this means that I cannot be compelled to admit that I have committed any crime and cannot be compelled to testify in court upon trial unless I choose to do so.
5. I know that under the Constitution of Utah that if I were tried and convicted by a jury or by the court that I would have a right to appeal my conviction and sentence to the Supreme Court of Utah for review of the trial proceedings and that if I could not afford to pay the costs for such appeal, that those costs would be paid by the State without cost to me and to have the assistance

of counsel on such appeal. However, it is my further understanding that while I am waiving my rights to appeal as to guilt, I still preserve my right to appeal as to the constitution ramifications of the Utah death penalty statutes.

6. I know and understand that by entering a plea of guilty I am waiving my constitutional rights as set out in the five preceding paragraphs and that I am, in fact, fully incriminating myself by admitting I am guilty of the crimes to which my plea of guilty is entered.
7. I know that under the laws of Utah the possible maximum sentence that can and may be imposed upon my plea of guilty to the charges identified on page one of this affidavit are:
 - (A) Death or life imprisonment.
 - (B) Imprisonment in the Utah State Prison for a term of not less than five years and not more than life.
 - (C) And/or fined in any amount not in the excess of \$10,000.

And that the imprisonment may be for consecutive periods, or the fine for additional amounts, if my plea is to more than one charge. I also know that if I am on probation, parole, or awaiting sentencing upon another offense of which I have been convicted or to which I have pleaded guilty, my plea in the present action may result in consecutive sentences being imposed on me.

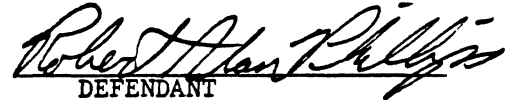
8. I know that the fact that I have entered a plea of guilty does not mean that the court will not impose either a fine or sentence of imprisonment upon me and no promises have been made to me by anyone as to what the sentence will be if I plead

guilty or that it will be made lighter because of my guilty plea.


9. No one has forced or threatened or coerced me to make me plead guilty and I am doing so of my own freewill and after discussing it my attorneys. I know that any opinions they may have expressed to me as to what they believe the court may do are not binding on the court.
10. No promises of any kind have been made to induce me to plead guilty. I am also aware that any charge or sentencing concessions or recommendations or probation or suspended sentences, including a reduction of the charges for sentencing made or sought by either defense counsel or counsel for the State, is not binding on the court and may be approved and followed by the court.
11. I am not now under the influence of either drugs or alcohol.
12. I have read this affidavit, or I have had it read to me by my attorneys, and I know and understand its contents. I am 26 years of age, have attended school through the 12th grade and I can read and understand the english language. I have discussed its contents with my attorneys and ask the court to accept my plea of guilty to the charges set forth above in this affidavit because I did, in fact, on the 1st day of January, 1980, in Salt Lake County, State of Utah, intentionally or knowingly cause the death of Everett Hamby, Jr. while I was engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit Aggravated Robbery; and that on or about the 1st day of January, 1980, in Salt Lake County, State of Utah, unlawfully and intentionally take personal property in the

possession of Everett Hamby, Jr. at or near 2700
West 900 South, from the person or immediate
presence of Everett Hamby, Jr., against his will,
by the use of force of fear, and in the commission
of same did use a firearm.

DATED this 16th day of June, 1980.

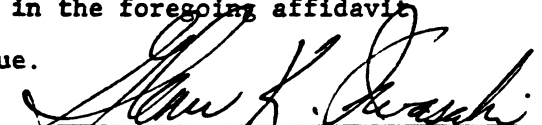

DEFENDANT

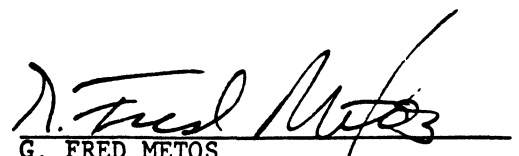
SUBSCRIBED AND SWORN to before me in Court this
16th day of June, 1980.


CHRISTINE M. DURHAM
DISTRICT COURT JUDGE

CERTIFICATE OF DEFENSE ATTORNEY:

We certify that we are the attorneys for ROBERT ALAN PHILLIPS,
the defendant named above and we know he has read the affidavit,
or that we have read it to him, and we discussed it with him
and believe he fully understands the meaning of its contents
and is mentally and physically competent. To the best of
our knowledge and belief the statements, representations and
declarations made by the defendant in the foregoing affidavit
are in all respects accurate and true.


GLENN K. IWASAKI
Defense Attorney


G. FRED METOS
Defense Attorney

CERTIFICATE OF PROSECUTING ATTORNEY:

I certify that I am the attorney for the State of Utah in its


case against ROBERT ALAN PHILLIPS, defendant. I have reviewed the Affidavit of the Defendant and find that the declarations are true and accurate. No improper inducements, threats, or coercions to encourage a plea have been offered the defendant. The plea negotiations are fully contained in this affidavit or as supplemented on the record of the court. There is reasonable cause to believe the evidence would support the conviction of the defendant for the plea offered or for the greater offense as charged, and that acceptance of the plea would serve the public interest.


PROSECUTING ATTORNEY

O R D E R

BASED UPON THE FACTS set forth in the foregoing Affidavit and Certification, the Court finds the defendant's plea of guilty is freely and voluntarily made and it is ordered that defendant's plea of "guilty" to the charges set forth in the Affidavit be accepted and entered.

DONE IN COURT THIS 16th day of June, 1980.


CHRISTINE M. DURHAM
DISTRICT COURT JUDGE